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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1091

JACK LIVINGSTON, a minor, by TENNYSON D. LIVINGSTON, his father and next friend; and TIM HELLBERG, a minor, by HARRY HELLBERG, his father and next friend,

Respondents,

vs.

HARLEY SWANQUIST, MILES LUTTER, LYLE HUGHARD, JAY GOSSETT, JACK BROBST, GERALD DAUWALDER, RAYMOND LUBBS, each individually and as members of the Board of Education for School District 308; DOUGLAS MOEWS, individually and as Principal of the Oswego Community High School; and the BOARD OF EDUCATION for the School District 308,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Now Comes the Defendants-Petitioners by Lambert M. Ochsenschlager and Robert B. Hupp, their attorneys, and present to this Honorable Court their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Petitioners state:

A.

There are two opinions in this case, both of which are contained in the Appendix filed with this Petition. They are:

(1) Opinion by the Honorable Joseph Samuel Perry, District Judge, United States District Court for the Northern District of Illinois, Eastern Division, No. 69-C-2677. (314 F. Supp. 2).

(2) The opinion, here sought to be reviewed, of the United States Court of Appeals for the Seventh Circuit, Court No. 18663, ... F. 2d .....

B.

Statement of grounds on which jurisdiction is invoked.

(1) The judgment in the above cause was rendered by the Court of Appeals on the 28th day of May, 1971.

(2) No Petition for rehearing was requested nor was any extension of time within which to Petition for Certiorari requested. A Stay of Mandate for thirty days was entered. (Appendix, page 45a)

(3) Jurisdiction of the Federal Court is asserted by the Plaintiff and Respondent here under 28 U.S.C., Sections 1343, 2201, and 2202 and 42 U.S.C., Section 1983 as amended. These code references are set forth in full in the Appendix (pages 30a-31a) filed with this Petition.

C.

The questions presented here for review are as follows:

(1) Do the federal courts have power to, and should they (under the United States Constitution) assume the duty, intrusted to the State, of running the tens of thousands of school districts of our country on the matter of the legality of a dress or grooming code enacted by the school board of the district when the regulations:

(a) were written and recommended to the school board by a committee of its students, parents and teachers for adoption;

(b) are not claimed to be vague or indefinite in their terms;

(c) are not charged with being unreasonable nor arbitrary in their terms;

(d) have been uniformly enforced as to all students;

(e) are not objected to by the parents of the two offended students;

(f) without contradiction in the evidence, have been supported by four expertly, trained educators who testified that the maintaining of the Code and enforcement thereof would be productive of a learning climate that is vitally needed in the efficient operation of a classroom for high school students.

(2) Does the enactment and enforcement of such a code violate the First Amendment to the Constitution of the United States of America?

(3) In light of the provisions of the Illinois Constitution (Appendix, page 22a) requiring and guaranteeing a good common school education for all children and the

statutory provision requiring and authorizing the school boards to promulgate reasonable rules for the operations of the schools, are not the following conclusions legally correct?:

(a) Does not the public policy of the State of Illinois not only favor, but require the school boards to make and enforce reasonable rules? (See Illinois School Code—Appendix, pages 21a, 22a)

(b) Is it not true that the Fourteenth Amendment (Appendix, page 23a) gives the federal court no power to impose upon the states their views of wise economic or social policy?

(c) Is not the District Court correct and the Court of Appeals in error when it holds that the constitutional protection of the students has been violated in contrast with the District Court's opinion on page 7 as follows:

> "Although minor plaintiffs claim that their rights to due process and equal protection have been violated, they did not pursue their due process claim on the trial or present evidence thereof. Minor plaintiffs had full and complete notice of the adoption of the code. They were advised at the November 10th convocation, at the December 3rd, 1969 school board meeting, and at other times of the reason for not being admitted to school. Yet they continued to simply dispute with, and to defy the powers of the school board and school authorities. As to procedural due process, the court noted the plaintiffs did not pursue their state remedy before filing this action. There simply is no lack of due process shown, except by the legal conclusion in the complaint."

In other words, is it sufficient to plead lack of due process without producing evidence at the trial to prove that such has been denied?

(d) Is not the Court of Appeals in error when it rejected the District Court's conclusion that not only have schools been controlled by teachers and school boards but it has been and is their constitutional function under the Tenth Amendment which reserves such control to the states as part of the police power? (314 F. Supp. p. 6) Appendix, page 23a.

(e) Is it true that a standard to the principle that the Fourteenth Amendment of the Constitution of the United States gives the federal courts no power to impose upon the States their views of wise economic or social policy? (See opinion of District Court Appendix, page 11a)

(f) Is the memorandum decision of The Honorable Justice Hugo L. Black rendered in vacation in the case of *Karr* v. *Schmidt,* Feb., 1971 in which he expressed his personal view that State schools should be run by the State, and the duly authorized representative of the State without intervention of the Federal Court System correct? (See Memorandum Opinion of Justice Black in Appendix, page 42a)

(g) Is it proper for the Court of Appeals to assess damages against School Board member defendants, in a case such as this, where the Court of Appeals conclusively found an absence of malice. A concensus of opinion of judges of our federal courts would have approved of the adoption and enforcement of the Code based upon the results of similar cases chosen at random and submitted in the Appendix, page 23a, for the purpose of showing that our federal judges, by an extremely

slight margin, favor the upholding of the Constitution and the denying of jurisdiction of these petty cases in the federal court when they can or should be tried in the State Court? Should more knowledge of the law be expected of school board members?

(h) Is it not dangerous and contrary to the best interest of the entire country to place such an exacting burden upon conscientious school board directors who serve without pay and give of their time as devoted public servants—might this discourage the intelligent man from making himself available for these very vital gratis positions if he is expected to be more knowledgable in the law than our federal judges.

D.

The constitutional provisions, statutes, etc. upon which this petition is based are set forth in the Appendix.

E.

STATEMENT OF THE CASE.

This case involves the right of school authorities to adopt and enforce a Dress Code for high school students which involves limitations on the length of the hair of male students.

The Grooming Code involved was adopted upon the recommendation of a committee composed of parents, students and teachers. In the suit, no claim that the Code is unreasonable or vague is made by the plaintiffs. While the parents disliked the long hair and urged their children to comply with the provisions of the Code, they

tolerated their refusal and eventually brought the action in behalf of the children.

The plaintiffs are both 16 years of age, and attended the Oswego Community High School in School District No. 308.

On May 15, 1970, the trial court heard the evidence and directed counsel to file briefs. Under Illinois law, children are required to attend school until they reach the age of 16 years, and the Illinois Constitution puts a requirement on the State to furnish a free, common school education to all children. The Illinois School Code requires school boards in the State to perform various duties enumerated, including the adoption and enforcement of all necessary rules for the management and government of the schools in their district, including the discipline of pupils and the power to suspend or expel students guilty of gross disobedience or misconduct.

Prior to the opening of school in the Fall term of 1969, the Dress and Grooming Code had not been adopted. Shortly thereafter, on the recommendation of the committee, the Board adopted the present code which provided generally:

> "Cleanliness and good groom should be the rule for boys' hair style. Hair must be tapered in back and on the sides or, if worn long, must not hang over the top of the collars and must be groomed sc it will not cover any part of the ears. Length of the hair on the forehead is limited to eyebrow level. Sideburns, neat and trimmed, may not extend below the earlobe. All boys will be clean-shaven." (See Appendix, pages 20a-21a).

The announcement of the Code was made on October 6, 1969 with the enforcement date to commence on No-

vember 10, 1969. Of the 300 male students enrolled in the 1969 Fall term at this particular school, only two refused to comply—these plaintiffs. They were informed that they could not attend classes until they complied with the code, and they refused to return unless they could do so without complying with the hair grooming rule.

Neither of these boys have claimed to have been in compliance with the grooming provision, nor did they allege that they had not had notice of the enactment of the code by the School Board. The plaintiffs merely refused to comply. They wanted the code repealed and demanded that school authorities re-admit them in spite of the fact that they were admittedly in violation and defiance of the hair grooming provision.

They justified their defiance to the trial judge on the theory that they wanted to wear their hair long as an expression of their "freedom". They also said that they "liked it that way". They claimed a constitutional right to dress and groom as they saw fit while attending high school in spite of any rules or regulations. Neither claimed any political, racial or religious belief involved in the wearing of long hair. In effect, they wanted to display to all who saw them that they were the type of persons who did what they wanted to do when they wanted to do it.

At the preliminary hearing, it was agreed that they would be re-admitted to school pending a final hearing of the cause if the children would either pin up or tie back their hair in such a manner as their ears would show and so as not to exceed the limitations as to the length and placement set forth in the Dress Code.

Since being re-admitted to school under the above provisions, and on their own testimony, they have either been truant or absent at least one day a week and Jack Livingston testified that he had forged his father's signature to excuses, and stated that he was home when, as a matter of fact, he was not. On one occasion when the two of them claimed to be ill, they were found in downtown Aurora, a distance of four or five miles, where they claimed they went by walking. The boys displayed a strong desire to abolish all restraints and all discipline without regard to the overall effect on the other children in the school system or upon the system itself.

Defendants produced four expert witnesses, each of whom had many years of experience in teaching and in administrative capacities in education. One had a Doctor's Degree and was in charge of the Educational Department of Aurora College; another had many years of experience as a school administrator. All these experts testified that, from their professional and educational experience and training, they were of the opinion that there is a direct correlation between dress and grooming and good behavior, discipline and a teaching climate in the classroom. None of this testimony was refuted, nor was any attempt made to refute the opinion of these experts.

True, there was no disturbance in the classroom or school involving these young men with their long hair—however, it should be remembered that they were suspended from schoool commencing with the first day of the enforcement of the regulations, and there was little, if any, opportunity for the clash between them and other students to materialize. This is mentioned because some cases seem to argue that the hair code is not justified

until the clash between the long haired students and the normal students occurs. The School Board here attempted preventive measures rather than wait until serious damage or injury might have occurred.

Pictures of the young men with their hair dress were introduced into evidence and are part of the record.

A more detailed statement is found in Judge Perry's decision which is found in the Appendix at pages 1a-17a.

F.

There is no state court judgment involved.

G.

Basis for federal jurisdiction. See B(3) and D, supra.

H.

There has been such a rash of these cases involving the dress and grooming codes in high schools throughout the country filed in the federal courts that they have earned their own designation of "long hair cases".

Not only federal courts of appeals, but district courts, as well, are in complete conflict in their opinions as to the constitutionality of a school dress or grooming code adopted and enforced by a duly elected school board in the performance of its duties assigned to it by the State.

Pages 24a-29a of Appendix G in the separate Appendix lists forty-six cases selected at random from federal court opinions (District and Appellate Courts) with the following table of results:

Upholding the constitutionality of the Code—26½;
Denying constitutionality of the Code—18½.

Only by this Honorable Court taking jurisdiction, considering the issues here involved, and deciding the same can the time, effort, and expenses now being incurred by Federal Courts, school districts, and individuals be eliminated, in light of the direct and wide-scale conflict in the views of Federal judges on the trial and appellate level. A pronouncement of this high Court is most essential. This is a classic case for certiorari within the policies enunciated by Rule 19 (b). It is doubtful that this Court has seen such a large number of decisions throughout the country on any one issue with great conflict of results.

Respectfully submitted,

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APPENDIX A

314 F. Supp. 1.

No. 69 C 2677.
United States District Court,
N. D. Illinois, E. D.
June 9, 1970.

Jack LIVINGSTON, a minor, by Tennyson D. Livingston, his father and next friend, and Tim Hellberg, a minor by Harry Hellberg, his father and next friend, Plaintiffs,

v.

Harley SWANQUIST, Miles Lutter, Lyle Hughard, Jay Gossett, Jack Brobst, Gerald Dauwalder, Raymond Lubbs, each individually and as member of the Board of Education for School District 308, Douglas Moews, individually and as Principal of the Oswego Community High School, and the Board of Education for the School District 308, Defendants.

MEMORANDUM OPINION AND ORDER

PERRY, District Judge.

This case involves the right of school authorities to adopt and enforce the terms of a dress code for high school students and to bar male students with long hair from school attendance. It also present the question as to whether by such action the school authorities violate the Constitutional rights of students. The subject is a timely one.

In the case at bar the high school had a dress code with which two teenage male students refused to conform and continued to wear their hair over the ears and shoulder length. The two students sought readmission to classes. The school authorities refused them admittance until

they wore their hair in compliance with the hair grooming provision of the school's dress code. The students, both minors, thereupon brought this action, each by his father and next friend, pursuant to the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution, charging violation of their rights thereunder, and seeking equitable and declaratory relief and damages. Jurisdiction is asserted under 28 U.S.C. Sections 1343, 2201 and 2202 and 42 U.S.C. § 1983 as amended.

Plaintiffs Jack Livingston and Tim Hellberg are each 16 years of age. Both minor plaintiffs and their parents are citizens of the United States and the State of Illinois. The parents of both plaintiffs are residents of and taxpayers in School District 308 in Kendall County, Illinois. On and prior to November 10, 1969, Jack Livingston and Tim Hellberg were each residing with their respective parents and were enrolled as students at Oswego Community High School in School District 308.

Plaintiffs named as defendants herein the Board of Education for School District 308 (hereinafter sometimes referred to as the "School Board"), members of the School Board, and Douglas Moews. the Principal of Oswego Community High School. All the defendants entered their appearances and filed answers herein.

On May 15, 1970 the court heard the evidence of all the parties and the argument of counsel. Each counsel was directed to supply the court with pertinent citations of authorities and the court then took the case under advisement for the purpose of preparing a memorandum opinion and final order in this cause. The court has jurisdiction of the parties hereto and the subject matter hereof and is this day entering this Memorandum Opinion and Order, which memorandum opinion and order shall stand as the court's findings of fact and conclusions of law herein.

Under Illinois law children are required to attend school until they reach the age of 16 years and if a child is over 16 and is enrolled in any grade through the fourth year of high school, he or she must attend school during the regular school term unless he is excused. School boards in the State of Illinois have their duties enumerated and these include the adoption and enforcement of all necessary rules for the management and government of public schools in their district, including the discipline of pupils and the power to suspend or expel students guilty of gross disobedience or misconduct. Ill. Rev. Stat. Chap. 122, Sections 26-1 and 26-2; 10-20.1 through 20.5; 24-24; 10-22.6(a).

Said Section 24-24 reads, in part, as follows:

> "Teachers and other certificated educational employees shall maintain discipline in the schools. In all matters relating to the discipline in and conduct of the schools and school children, they stand in relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.
>
> "Nothing in this Section affects the power of the board to establish rules with respect to discipline."

Prior to the opening of the Fall 1969 term at Oswego Community High School, the school had not had a dress code with rules regulating the type and manner of students' attire and appearance. The School Board, teachers, students and the community had felt no need for such a code as there had been no serious problems and certainly no disciplinary problems regarding the dress and appearance of students. Variations from accepted standards of dress and conduct which had developed before that time had been solved by a process of persuasion.

However, beginning in the Fall of 1969 the influence of the student protest movement throughout the country,

with its portrayal on television and reports in the news media, began to be felt and there arose in the community a demand for the adoption of a dress code for the junior and senior high schools.

Responding to the demands of parents, teachers and students, the School Board directed Douglas Moews, the Principal at Oswego Community High School, to appoint a committee to make a study, survey public opinion, and finally to make recommendations concerning a dress code for the schools. Named to the committee were two students from the junior high school, two students from the senior high school, two parents of junior high students, two parents of senior high students, two junior high school teachers, two senior high teachers and the administrators of the junior and senior high schools. Members had varying viewpoints and one male student favored the wearing of long hair by male students. The names of the committee members were publicly announced and plaintiffs herein made no objection to the committee as appointed. In fact no objection was made to the membership by any person. The committee held meetings and there was wide community participation in its decisions.

Copies of the proposed dress code were distributed to School Board members at their regular meeting on October 13, 1969, and after lengthy discussion, involving many opinions expressed from guests at the meeting, the Board decided to hold the code for further study and to wait and announce the code in its final form at its next meeting. The dress code again was on the agenda of a special session of the Board on November 3rd and the Board decided the dress code was essential. It concluded certain standards of dress and good grooming promote a wholesome academic atmosphere and would reflect in the well-being of the community. It also was the Board's opinion that the vast majority of students wish to create a favorable impression of themselves and their schools. The Board also determined that since there is so much

similarity in the dress of male and female students who wear slacks and sweaters, there should be some way by which teachers could easily distinguish the boys from the girls and thus avoid difficulties which could arise if some unruly, or ill-mannered, or malicious-minded boy entered a girl's washroom or vice versa. The Board decided that an effective method would be to prohibit boys from adopting girl's hair styles and that the most practical procedure would be to require the boys to have their hair cut so as to expose their ears and no longer than the top of their collars. The Board also determined that the wearing of a girl-style hairdo by boys was in fact a disruptive influence and interfered with order in the classroom.

At its November 3rd session, the Board adopted a dress code, including the following requirement, pertinent herein:

> "Cleanliness and good grooming should be the rule for boys' hair styles. Hair must be tapered in back and on the sides or, if worn long, must not hang over the top of the collars and must be groomed so that it will not cover any part of the ears. Length of the hair on the forehead is limited to eyebrow level. Sideburns, neat and trimmed, may not extend below the ear lobe. All boys will be clean-shaven."

Copies of the code were made available in the school's homerooms where it was read and discussed. On November 6, 1969 the school held a general convocation for all students and Jack Livingston and Tim Hellberg were present. The dress code was read, explained and fully discussed. The students, including minor plaintiffs herein, were then and there informed that the dress code would become effective; that after November 10, 1969 the code would be enforced and, further, that any student who failed to dress or groom himself or herself according to the code would not be permitted to remain in school from and after November 10, 1969.

Oswego Community High School had approximately 300 male students enrolled in its 1969 Fall term. Came November 10th and 33 of the 300 boys in the school appeared with their hair covering their ears and falling below their collars and otherwise not in compliance with the hair grooming provision of the code. Jack Livingston and Tim Hellberg were among the 33. The Principal promptly sent all 33 students home with directions to see their barbers before returning. Most of the boys returned to school on the same day with their hair dressed in conformity with the regulation. All of the 33 boys had returned by the next day in compliance with the hair grooming provision except Jack Livingston and Tim Hellberg. All these 31 students were immediately admitted to classes. Since that time there has been no further dress or grooming problem at the school except that concerning minor plaintiffs.

Both Jack Livingston and Tim Hellberg left the school on November 10, 1969 after being informed they could not attend classes until they complied with the regulation concerning style and length of hair. Thereafter school authorities urged the two students to comply with the dress code and return to school but they refused to return unless they could do so without complying with the hair-grooming rule. It also appears that the parents of both these minors requested their children to comply and return to school but both minors refused to do this and their parents acceded to their decision. On several occasions both Jack Livingston and Tim Hellberg returned to school without complying with the regulation and requested admission. This was denied them.

Minor plaintiffs were before this court on January 2, 1970 for a preliminary hearing and again at the trial on May 15, 1970, as hereinafter more fully set forth, and the court observed that on both occasions they were wearing their hair shoulder length, over their collars, covering their ears, in a style similar to a girl's hairdo, and in

violation of the hair grooming provision of the school's dress code. Pictures of Jack Livingston and Tim Hellberg, taken at their depositions on February 27, 1970, are in evidence and show them wearing their hair long and otherwise in violation of the hair grooming provision of the code.

Jack Livingston and Tim Hellberg have never claimed they have been in compliance with the hair grooming provision or that they did not have notice of the enactment of the dress code by the School Board. Minor plaintiffs did appear at a regular meeting of the Oswego School Board on December 8, 1969, at which the dress code was being reconsidered, and their attorney inquired as to the exact status of minor plaintiffs and if the Board was going to enforce the code. The attorney wrote a letter to the School Board on December 15, 1969 which asked the Board to rescind the code and readmit minor plaintiffs to school. Neither on December 8 or December 15 did Jack Livingston and Tim Hellberg claim they were in compliance with the hair grooming regulation, nor did they offer to comply before the Board on December 8, or in the letter of December 15 aforesaid.

Minor plaintiffs simply refused to comply, wanted the code repealed and demanded that school authorities readmit them in spite of the fact they were admittedly in violation and defiance of the hair grooming provision. They, in effect, asked for unequal protection of the law for themselves, that a special exception be made for them, and that the code apply to all others but not to them. This exception the School Board and school authorities properly refused to grant.

These two minors had full knowledge of the school's dress code. They were advised on November 10th and at other times of the reason for not being admitted to school. They defied the hair grooming provision and continue to defy it on the grounds that they want to wear their hair

long as an expression of their "freedom" and as each of them testified, "I like it that way." They maintain they have a constitutional right to be dressed and groomed as they see fit. Neither of minor plaintiffs claims he has any political, racial or religious belief involved in wearing hair long, or that there is any sanitary reason therefor. With each of minor plaintiffs it is merely a matter of personal choice.

Although parents of both boys oppose the long hair style affected by their sons, they apparently find it easier to acquiesce rather than discipline them in this matter. The parents thus pass on their responsibility to the school and community as too many parents are doing in this permissive age, and the parents thereby contribute to the lack of discipline and lawlessness among the youth of our country.

Jack Livingston and Tim Hellberg remained away from school and on December 31, 1969 filed this action asking this court to declare the dress code null and void and inapplicable to minor plaintiffs, to declare the school's action in barring plaintiffs from school as illegal and unconstitutional, to enjoin defendants from suspending, expelling or denying minor plaintiffs admittance to school because of their hair style and to grant plaintiffs actual damages, exemplary damages and their costs of action.

On January 2, 1969 minor plaintiffs appeared in this court seeking a preliminary injunction to restrain the School Board and school authorities from enforcing the code. At the trial in May the two students claimed that class time would be lost by them for the reason that they felt it necessary to keep working on their hair during class with their hands to make certain it would remain pinned up in rolls. However, at the January 2nd hearing, counsel for plaintiffs and defendants reached an agreement whereby minor plaintiffs would be readmitted to school pending a final hearing of this cause if they

would either pin up or tie back their hair in such manner as their ears would show and so as to not exceed the limitations as to length and placement set forth in the dress code. While it was not so stated by the defendants, the court concludes from the evidence at the trial that the reason the defendants were willing to enter into such a temporary agreement was because it made it possible to easily distinguish the fact minor plaintiffs were males and not females. The agreement was carried out and minor plaintiffs were readmitted to school. However, they have not been in regular attendance because of their own truancy. By its entry into this agreement the School Board demonstrated clearly that the Board has never acted arbitrarily or capriciously but has at all times wanted plaintiffs to attend school and that the Board and school authorities were willing to go more than half way to make it possible for these two teenagers to remain in school.

Now let us examine the conduct of Jack Livingston and Tim Hellberg since their return to school. Although they returned to school on January 5, 1970, they by their own testimony have been either truant or absent at least one day a week. Jack Livingston testified that he had forged his father's signature to excuses stating that he was home ill when, as he admitted, he and Tim Hellberg went to downtown Aurora, a distance of four or five miles. They went the distance on foot. Tim Hellberg presented an illness excuse signed by one of his parents when he returned to school the next day, namely April 17, 1970 which was false in view of the undisputed evidence that he walked to Aurora that same morning. In the court's opinion plaintiff's parents again show lack of courage and parental duty in collaborating or condoning such conduct on the part of their minor children.

From all of the evidence and its observation of minor plaintiffs' attitudes, the court finds and concludes Jack Livingston and Tim Hellberg are not interested in attend-

ing school. Once readmitted under the agreement, they were truant. They do not want to go to school. They are two very bright boys who are selfish and totally undisciplined. The right they really want to assert is not constitutional but a kind of anarchy, the placing of their individual desires over and above parental authority and the law. These two teenagers would abolish all restraints and all discipline. That is what this suit is all about. If their parents, who are taxpayers, had any belief that their children were being deprived of any rights, or were being discriminated against, or were not receiving equal protection of the laws of the State of Illinois or the United States Constitution, the parents would have participated in and testified at the trial. Their failure to testify speaks louder than volumes of legal rhetoric.

Defendants produced four experts, each with many years of experience in teaching and in administrative capacities in education. One had a Doctor's Degree and was in charge of the Educational Department of Aurora College; another had many years of experience as a school administrator. All of these experts testified that, from their professional and educational experience and training, they were of the opinion that there is a direct correlation between dress and grooming and good behavior, discipline and a teaching climate in the classroom. None of this testimony was refuted, nor was any attempt made to refute the opinions of these experts.

[1] This court finds that the School Board was not arbitrary or capricious but was justified in adopting a school dress code for Oswego Community High School. There was reasonable necessity for the code in the administration of an orderly school program at the school. In this court's opinion defendants have established that violations of the school's dress code can be disruptive and can adversely affect discipline and decorum in the classroom. Defendants have shown a school dress code is an aid in maintaining good order in the school and a proper teaching climate.

School officials are best able to determine what rules are reasonable and necessary—not the Federal courts. It is high time the Federal courts cease interfering with the management and enforcement of discipline in the schools and return conduct and control back to school authorities. School boards and authorities have traditionally had such control until the past few years when over-zealous civil rights organizations and others have brought a growing number of complaints in the Federal courts. Not only have the schools been controlled by teachers and school boards but it has been and is their constitutional function under the Tenth Amendment which reserves such control to the States as part of the police power.

This is one of those cases, involving social and economic affairs of a State, which is not a case for intervention by the Federal court. As the Supreme Court of the United States on April 6, 1970, said, in the case of *Dandridge, et al.* v. *Williams, et al.*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, 1969,

> "* * * It is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic or social policy."

It is unnecessary for the court to say more than that the Tenth Amendment to the Constitution reserves the questions here involved to the States, among which is the State of Illinois. However, since this case was fully tried and the parties have cited various decisions in the United States District Courts and Courts of Appeal, this court feels further comment is in order.

Plaintiffs claim the dress code restricting length and style of plaintiffs' hair is invalid, in excess of the authority conferred upon defendants, is unreasonable and not calculated to promote the objects of the Illinois Constitution and School Code. Illinois Revised Statutes,

supra, impose a duty on School Boards not only to adopt but to enforce necessary rules for management and government of schools in their district, including rules to encourage discipline and promote a favorable classroom climate. These duties and powers have been affirmed in *Wilson* v. *Board of Education*, 233 Ill. 464, 84 N.E. 697; *Sutton* v. *Board of Education*, 306 Ill. 507, 138 N.E. 131, and *Segar* v. *Board of Education*, 317 Ill. 418, 148 N.E. 289. The leading case in Illinois on the duty of school boards is the *Wilson* case in which the Illinois Supreme Court stated, 233 Ill. page 470, 84 N.E. page 698:

> "* ** The power of the board of education to control and manage the schools and to adopt rules and regulations necessary for that purpose is ample and full. The rules and by-laws necessary to a proper conduct and management of the schools are, and must necessarily be, left to the discretion of the board, and its acts will not be interfered with nor set aside by the courts unless there is a clear abuse of the power and discretion conferred. Acting reasonably within the powers conferred, it is the province of the board of education to determine what things are detrimental to the successful management, good order and discipline of the schools and the rules required to produce these conditions."

The United States Supreme Court has repeatedly reminded the lower courts that they should not interfere in the daily operation of the schools. In *Tinker* v. *Des Moines, etc., School District*, 393 U.S. 503, at 507, 89 S. Ct. 733, at 737, 21 L. Ed. 2d 731 (1969), the Supreme Court said:

> "* * * the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

And in *Epperson* v. *Arkansas,* 393 U.S. 97, at 104, 89 S. Ct. 266, at 270, 21 L. Ed. 2d 228 (1968), the Court earlier had reminded:

> "* * * By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

To like effect in rejecting challenges to various school regulations are *Davis* v. *Firment,* 269 F. Supp. 524 (1967); *Ferrell* v. *Dallas Independent School District,* 392 F. 2d 697 (5th Cir.), cert. denied, 393 U.S. 856, 89 S. Ct. 98, 21 L. Ed. 2d 125; *Leonard* v. *School Committee of Attleboro, Mass.,* 349 Mass. 704, 212 N.E. 2d 468 (1965); *Crossen* v. *Fatsi, D.C.,* 309 F. Supp. 114 (1970); *Brownlee* v. *Bradley Cty. Board, D.C.,* 311 F. Supp. 1360, decided April 10, 1970. The court has also read and considered the case of *Jackson, et al.* v. *Dorrier, et al.,* 424 F. 2d 213, decided April 6, 1970, in the Court of Appeals for the Sixth Circuit, which decision supports defendants position herein.

Although minor plaintiffs claim that their rights to due process and equal protection have been violated, they did not pursue their due process claim on the trial or present evidence thereof. Minor plaintiffs had full and complete notice of the adoption of the code. They were advised at the November 10th convocation, at the December 3, 1969 School Board meeting and at other times of the reason for not being admitted to school. Yet they continued to simply dispute with, and to defy the power of, the School Board and school authorities. As to procedural due process, the court noted the plaintiffs did not pursue their State remedy before filing this action. There simply is no lack of due process shown except by the legal conclusion in the Complaint.

Minor plaintiffs theorize that since they have an admitted right and statutory duty to attend school at their age, the action of the School Board in adopting a dress code contrary to their approval, and their exclusion from school because of non-compliance with it, deprives them of a constitutional right by creating an invidious classification which results in unequal protection of the laws. This is just so much legal jargon.

[2] Regulations of the states must, of course, not violate the protection afforded under the Federal Constitution. Rules of a dress code, such as the one in question here, are required to be fair and reasonable, specific enough to be understood, and justified. The Oswego Community High School dress code and its hair grooming provision meets all these standards. The code was not arbitrary in defining a class to which it applied. The code was not discriminatory; it was applied equally to all students. There is no claim or showing that it was not equally enforced. Exactly the contrary was shown. Thirty-one of the 33 students not in compliance with the code conformed to the hair grooming provision and were readmitted to school. Defendants offered and still offer to readmit minor plaintiffs under the same conditions. Minor plaintiffs figuratively have the keys to the school rooms in their pockets and may open the doors to them at will. In fact there are no locks that bar their entrance. The bar is all in their own strong-willed and undisciplined minds.

[3] As to Jack Livingston's and Tim Hellberg's claims that enforcement of the regulations deprived them of freedom of speech and expression under the First Amendment, this court concludes from their own testimony and otherwise that they did not wear their hair long for political, social or religious reasons, or as symbols of a movement or as a way of expressing themselves as to come within the concept of free speech in the First Amendment. Theirs was a personal choice as to hair dress. It was not an expression of freedom of speech as

in the *Tinker* case, supra, where the school pupils wore black armbands to protest the Government's policy in Vietnam. The parallel in the instant case is with the *Ferrell* case. As in the *Ferrell* case, minor plaintiffs herein appear to be making a studied effort to draw attention to themselves, which is disruptive in the classroom. They want an education on their own terms. As the court said in *Ferrell,* "• • • this court is concerned for the welfare of individual plaintiffs in this case, but feels the rights of other students, and the interest of the teachers, administrators and the community at large are paramount."

As the Board of Education of Oswego Community High School said in the introduction to the dress code for the Junior and Senior High Schools,

> "Students actions, attitudes and attire convey an impression to the adult sector that maintains and supports public school program. It is the opinion of the Board of Education and the administration that the *vast majority* of Junior and Senior High School students wish to create a favorable impression of themselves and the schools they represent. In order to assist the students, the following code will be in effect for the 1969-70 school year, and compliance shall be required: • • •." (Emphasis supplied)

The School Board had compelling reasons for adopting and enforcing the dress code and by suspending students who wear long hair simply because they "like it that way" the Board did not violate their rights under the United States Constitution and the laws of the State of Illinois.

Since plaintiffs have sought to rely on certain cases in this District Court and affirmances by the Court of Appeals for the Seventh Circuit, it is appropriate to distinguish the cases here. Defendants cite *Breen* v. *Kahl,* 296 F. Supp. 702 (1969), affirmed by the Court of Ap-

peals for the Seventh Circuit, 419 F. 2d 1034. Certiorari was recently denied and it is understandable the Supreme Court did not see fit to grant certiorari when the trial court below found as a matter of fact that defendants therein failed to sustain the burden of justification for adoption of the regulation in that code. This lack of justification was pointed out in the decision of the Circuit Court of Appeals in *Breen* when that court distinguished the *Breen* case from *Ferrell* v. *Dallas Independent School District,* 392 F. 2d 697. In the latter case the defendant school board made a showing of justification for its code, just as defendants did here in the case at bar. This court also notes that in the *Breen* case, plaintiffs therein first pursued a State remedy. Jack Livingston and Tim Hellberg, plaintiffs herein, have not done so.

Plaintiffs also cite the case of *Miller* v. *Gillis, et al.*, D.C., 315 F. Supp. 94, decided by the Honorable James B. Parsons of this District Court. A careful reading of that case reveals that Judge Parsons was concerned with the equal protection clause of the Fourteenth Amendment as it applied to students at Barrington Consolidated High School, where plaintiff therein was a student. The record showed that several male teachers at the school were in violation of the school's dress regulations and that the Barrington dress code required different treatment of the student from his teacher, which was clearly unreasonable and violated the equal protection clause.

Statutes and school board dress codes have certain unwritten but implied provisions just as State officials and school boards have certain unwritten powers and authority. For example, who can dispute the power of a school board and school authorities to deny admittance to nude students or girls wearing topless dresses or boys wearing unbuttoned shirts and no trousers? Suppose the School Board and school authorities had denied admittance to a 15-year-old boy who is required by law to at-

tend school but who appeared nude. Under these circumstances would the court have jurisdiction to compel the School Board and authorities to admit the student without first compelling the student to clothe himself? Or would the correct remedy be to compel the student to first dress and then seek admittance? On the other hand who could believe that a school board and authorities would have the power to enforce a regulation requiring girl's skirts to reach the ankles or boys' jackets to fit closely around the throat? The answer is simple and sensible. School boards have the power to adopt and enforce reasonable dress regulations that meet the needs of the schools and conform to social custom. This is just what the Oswego School Board and authorities did.

In this court's opinion, this court and no other court has jurisdiction or power to interfere with such action of the Board and school authorities since the action was not overreaching and did not violate minor plaintiffs' constitutional rights. The court considers the *Dandridge* case, supra, a landmark case in its admonition to the Federal courts not to impose upon the States their views of wise economic and social policy. This court heeds that admonition.

For the reasons herein set forth, the court finds the issues of fact and law herein for defendants and denies plaintiffs the relief herein requested. It is ordered, adjudged and decreed that this cause be and the same is hereby dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
May 27, 1971
Before
Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

JACK LIVINGSTON, a minor, etc., and TIM HELLBERG, a minor, etc., *Plaintiffs-Appellants*, vs. HARLEY SWANQUIST, *et al.*, *Defendants-Appellees*.

No. 18663

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

This is an appeal from a judgment dismissing the complaint after a bench trial in an action brought pursuant to 28 U.S.C. §§ 1343, 2201 and 2202 and 42 U.S.C. § 1983. The complaint sought preliminary and permanent injunctive relief, a declaratory judgment and actual and punitive damages against the defendants on account of their having barred minor plaintiffs from attending Oswego Community High School solely because of minor plaintiffs' failure to comply with a certain dress code promulgated by and on behalf of the defendants which prohibited, *inter alia*, the wearing by students of hair styles of greater length than that prescribed by the code.

The district court held that this court's decision in *Breen* v. *Kahl*, 419 F. 2d 1034 (7th Cir.), *cert. denied*, 398 U.S. 937 (1970), was distinguishable from the facts of this case on the ground that, while in *Breen* no justification was offered by the defendants to support the

promulgation of that dress code, here the defendants justified their dress code by presenting certain "expert" testimony that restrictions on dress were necessary to the learning-teaching role of public schools. Subsequent to the judgment of the district court here, however, this court decided *Crews* v. *Cloncs,* 432 F. 2d 1259 (7th Cir. 1970), in which we made clear that so-called expert testimony of the kind offered here is legally inadequate to satisfy the substantial burden of justification which must be met to validate school rules infringing the constitutional rights of public school students. We believe *Crews* is dispositive of the issues on this record. However, since our decision in *Crews* was not necessarily foreseeable by the defendants, we are of the opinion that this is an inappropriate case for the award of punitive damages on these facts.

Accordingly, the judgment of the district court is reversed and the cause is remanded with directions to the district court:

(1) to enter judgment

(a) declaring the hair style provision of the dress code promulgated by and on behalf of defendants for application at Oswego Community High School to be unconstitutional and null and void;

(b) permanently enjoining, without bond, defendants, their officers, agents, servants, employees, and attorneys, and those in active concert or participation with them or subject to their direction or control, from suspending, expelling or denying minor plaintiffs admittance to Oswego Community High School, or otherwise subjecting them to discipline in any form because of the length or style of their hair, and further mandatorily enjoining defendants to expunge from all records any report of absences or disciplinary or

academic actions taken due to minor plaintiffs' refusal to comply with the hair style provision of said dress code;

(c) finding for the plaintiffs, and all of them, and against the individual defendants, and all of them, as to the issue of liability;

(2) to conduct a new trial only as to the amount of actual compensatory damages to be awarded plaintiffs.

APPENDIX C

DRESS CODE FOR THE JUNIOR AND SENIOR HIGH SCHOOLS OF OSWEGO

Students' actions, attitudes and attire convey an impression to the adult sector that maintains and supports public school program.

It is the opinion of the Board of Education and the administration that the vast majority of Junior and Senior High School students wish to create a favorable impression of themselves and the schools they represent.

In order to assist the students, the following code will be in effect for the 1969-70 school year, and compliance shall be required:

1. Cleanliness and good grooming should be the rule for boys' hair styles. Hair must be tapered in back and on the sides or, if worn long, must not hang over the top of the collars and must be groomed so that it will not cover any part of the ears. Length of the hair on the forehead is limited to eyebrow level. Sideburns, neat and trimmed, may

not extend below the ear lobe. All boys will be clean-shaven.

Cleanliness and good grooming should be the rule for girls' hair styles. Hair shall not completely cover the eyebrows. Hair shall not be worn in rollers at school.

2. Culottes, skirts, and dresses shall be no shorter than midthigh.
3. Outdoor-type jackets shall not be worn to class.
4. Sweatshirts or T-shirts with markings other than District 308 or authentic college insignia are not acceptable.
5. Dress sandals are permissible with socks or hose.
6. Footwear with cleats shall not be worn.
7. Undershirts are not to be worn as outer garments.
8. No hats or sunglasses shall be worn in school. (Exception: Written permission by a qualified doctor)
9. Clothing should be clean and neat.
10. Shirts and blouses that are styled to be worn tucked in must be worn inside. Shirts and blouses must be appropriately buttoned at all times.

BOARD OF EDUCATION
OSWEGO COMMUNITY SCHOOLS
DISTRICT 308

The above dress code becomes effective November 10, 1969.

APPENDIX D

SEC. 24-24 of THE SCHOOL CODE OF ILLINOIS

Sec. 24-24. Maintenance of discipline. Teachers and other certificated educational employees shall maintain discipline in the schools. In all matters relating to the discipline in and conduct of the schools and the school

children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

Nothing in this Section affects the power of the board to establish rules with respect to discipline.

The board may make and enforce reasonable rules of conduct and sportsmanship for athletic and extracurricular school events. Any person who violates such rules may be denied admission to school events for not more than one year, provided that written 10 days notice of the violation is given such person and a hearing had thereon by the board pursuant to its rules and regulations. The administration of any school may sign complaints as agents of the school against persons committing any offense at school events. (Amended by Act approved July 31, 1967)

SEC. 10-20.5 of THE SCHOOL CODE OF ILLINOIS

Sec. 10-20.5. *Rules.* To adopt and enforce all necessary rules for the management and government of the public schools of their district.

APPENDIX E

THE CONSTITUTION OF THE STATE OF ILLINOIS—1870

ARTICLE VIII

Education

Sec. 1. The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.

APPENDIX F

CONSTITUTION OF THE UNITED STATES

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." . . .

APPENDIX G

Tabulation of 50 recent "long-hair" cases as determined by U. S. Federal Courts, both District and Appellate

I. DECISIONS UPHOLDING REGULATIONS

Key to Rationales:

D—Regulations upheld because of evidence that breach, or lack of regulation brings about

disturbance, disruption or diversions in school.

RR—Regulation upheld because reasonably related to the educational process.

NV—Regulation upheld because court found no violation of constitutional rights.

(Others as indicated)

(A) CIRCUIT COURTS OF APPEALS

(Fifth Circuit)

1. *Ferrell* v. *Dallas Independent School District,* 392 F. 2d 697 (1968);
   393 U.S. 856, 21 L. Ed. 2d 125 (1968), Douglas dissenting—D. cert. denied.
2. *Griffin* v. *Tatum,* 425 F. 2d 201 (1970). Though it is unreasonable to demand that hair on back of male's head be tapered, not blocked, hair regulations are not *per se* unconstitutional because reasonably related to educational process.
3. *Stevenson* v. *Wheeler County Board of Education,* 426 F. 2d 1154 (1970) R.R. (Shaving regulation).
4. *Wood* v. *Alamo Heights Independent School District,* 433 F. 2d 355 (1970) R.R.

(Sixth Circuit)

5. *Jackson* v. *Dorrier,* 424 F. 2d 313 (1970) R.R.

(Ninth Circuit)

6. *King* v. *Saddleback Junior College Dist. and Olff* v. *Eastside Union High School Dist.,* ..... F. 2d ..... (1971).(*)

(*) Note: This case was decided during the proofreading of this petition and was the most recent pronouncement on the subject.

(B) FEDERAL DISTRICT COURTS

(First Circuit)

1. *Farrell* v. *Smith,* 310 F. Supp. 732 (D. Me., 1970). Vocational school hair code upheld as reasonably related to enhancement of students' employment opportunities.

(Third Circuit)

2. *Gere* v. *Stanley,* 320 F. Supp. 852 (M.D. Pa., 1970) D & R.R.

(Fifth Circuit)

3. *Davis* v. *Firment,* 269 F. Supp 524 (La. 1967) D.
4. *Pritchard* v. *Spring Branch Independent School District,* 308 F. Supp. 570 (S.D. Tex. 1970). D & R.R.
5. *Whitsell* v. *Pampa Independent School District,* 316 F. Supp. 852 (N.D. Tex., 1970). D.
6. *Southern* v. *Board of Trustees for Dallas Independent School District,* 318 F. Supp. 355 (N.D. Tex., 1970), R.R.
7. *Pound* v. *Holladay,* 322 F. Supp. 1000 (N.D. Miss. E.D. 1971). R.R.
8 *Hammond* v. *Shannon,* 323 F. Supp. 681 (W.D. Tex. 1971). R.R.
9. *Sherling* v. *Townley,* (N.D. Texas); appeal pending in 5th Circuit No. 71-1474.

(Sixth Circuit)

10. *Gfell* v. *Rickelman,* 313 F. Supp. 364 (N.D. Ohio E.D., 1970) R.R. & D.
11. *Brownlee* v. *Bradley County, Tennessee Board of Education,* 311 F. Supp. 1360 (E.D. Tenn. S.D. 1970). N.V.
12. *Mercer* v. *Lothamer,* 321 F. Supp. 335 (N.D. Ohio, E.D., 1971). R.R., N.V.

(Eighth Circuit)

13. *Corley* v. *Daunhauer,* 312 F. Supp. 811 (E.D. Ark. W.D. 1970). Junior High School Band hair regulation upheld as reasonably relating to uniformity needed in a band.
14. *Giangreco* v. *Center School District,* 313 F. Supp. 776 (W.D. Mo. W.D., 1969). D.
15. *Bishop* v. *Colaw,* 316 F. Supp. 445 (E.D. Mo. E.D., 1970). R.R. & D.
16. *Carter* v. *Hodges,* 317 F. Supp. 89 (W.D. Ark. 1970). R.R.

(Ninth Circuit)

17. *Neuhaus* v. *Torrey,* 310 F. Supp. 192 (N.D. Cal., 1970). Special hair regulations are reasonable for high school athletes.
18. *Hatter* v. *Los Angeles City High School,* 310 F. Supp. 1309 (C.D. Cal., 1970). Injunction of enforcement of dress code not granted because of plaintiff's compliance and return to school, and because of lack of likelihood of their winning case on merits, court finding that the code violated no constitutional rights.
19. *Jeffers* v. *Yuba City Unified School District,* 319 F. Supp. 368 (E.D. Cal., 1970). R.R.

(Tenth Circuit)

20. *Brick* v. *Board of Education,* 305 F. Supp. 1316 (D. Colo., 1969). D.
21. *Freeman* v. *Flake,* 320 F. Supp. 531 (N.D. Utah, 1970).N.V.

II. DECISIONS INVALIDATING REGULATIONS

Key to Rationales:

D.P.—Regulation invalidated as violative of Fourteenth Amendment. Due process for want

of a reasonable relation of the regulation to a valid state interest.

E.P.—Regulation invalidated as violative of Fourteenth Amendment Equal Protection Clause.

1st—Regulation invalidated on First Amendment grounds.

Priv.—Regulation invalidated as violative of a right of privacy.

14th—Regulation invalidated on Fourteenth Amendment grounds generally.

9th—Regulation invalidated on Ninth Amendment grounds. (Citizens have rights other than those explicitly enumerated.)

No D—Court noted that facts of case included no evidence of disturbance, disruption or diversion caused by breach of grooming regulation.

Vague—Regulation invalidated as violative of Fourteenth Amendment (Due Process) because vague.

No Sub. Just.—Regulation invalidated because a constitutional right was derogated with no substantial justification.

(Others as Indicated)

(A) CIRCUIT COURTS OF APPEALS

(First Circuit)

1. *Richards* v. *Thurston*, 424 F. 2d 1281 (1970). D.P.

(Seventh Circuit)

2. *Breen* v. *Kahl*, 419 F. 2d 1034 (1969), cert. denied without explanation. 398 U.S. 937, 26 L. Ed. 2d 268 (1970). 1st, 9th Priv., No D.
3. *Crews* v. *Cloncs*, 432 F. 2d 1259 (1970). E.P.

(Fifth Circuit)

4. See *Griffin* v. *Tatum,* Supra, invalidating certain aspects of a hair regulation.

(E) FEDERAL DISTRICT COURTS

(Second Circuit)

1. *Crossen* v. *Fatsi,* 309 F. Supp. 114 (D. Conn., 1970) Vague (beard case)
2. *Dunham* v. *Pulsifer,* 312 F. Supp. 411 (D. Vt. 1970) No Sub. Just. (Grooming Code for athletes)

(Third Circuit)

3. *Martin* v. *Davison,* 322 F. Supp. 318 (N.D. Pa. 1971). 14th; No. D
4. *Axtell* v. *LaPenna,* 323 F. Supp. 1077 (W.D. Pa. 1971) D.P., No Sub. Just.

(Fourth Circuit)

5. *Lambert* v. *Marushi,* 322 F. Supp. 326 (S.D. W. Va. 1971) No. D. (Hair regulation could not be based on an undifferentiated and unrealized fear of disturbance)

(Fifth Circuit)

6. *Zachry* v. *Brown,* 299 F. Supp. 1360 (D.C. Ala. 1967). E.P. (Junior College Hair Code)
7. *Lansdale* v. *Tyler Junior College,* 318 F. Supp. 529 (E.D. Tex. 1970) No. D. (Junior College Hair Code cannot be based on undifferentiated and unrealized fear of disturbance).
8. *Karr* v. *Schmidt,* 320 F. Supp. 728 (W.D. Tex. 1970) D.P., E.P.
9. *Dawson* v. *Hillsborough County, Florida School Board,* 322 F. Supp. 286 (M.D. Fla., 1971). D.P., 1st, 9th, 14th.

(Sixth Circuit)

10. *Gordova* v. *Chonko*, 315 F. Supp. 953 (N.D. Ohio W.D., 1970). Principal could not indefinitely suspend a student (beyond the statutory limit of ten days) for violation of a hair code of his own making.

(Eighth Circuit)

11. *Westley* v. *Rossi*, 305 F. Supp. 706 (D. Minn. 1969). 14th, No. D.
12. *Sims* v. *Colfax Community School District*, 307 F. Supp. 485 (S.D. Ia., 1970) No Sub. Just. (Girl high school student protested hair length rule).
13. *Reichenberg* v. *Nelson*, 310 F. Supp. 248 (D. Neb., 1970). 1st, 9th (Teachers College hair code not justified—even by argument that grooming would enhance employment likelihood).
14. *Turley* v. *Adel Community School District*, 322 F. Supp. 402 (S.D. Ia., 1971). D.P.
15. *Parker* v. *Fry*, 323 F. Supp. 729 (E.D. Ark. 1971) 14th (even where prevention of disturbance as a *rationale* for a hair regulation).

III. THE TABULATION

Decisions upholding regulations—26½(•)

Decisions invalidating regulations—18½

Perhaps the score is even more in favor of upholding regulations when it is noted that among those decisions in the District Courts invalidating regulations, three (numbers 6, 7 & 13) involved college level attempts at regulation.

(•) The ½ derives from *Griffin* v. *Tatum* (Fifth Circuit) which held invalid only part of a hair regulation.

APPENDIX H

U. S. CODE

Title 28 §1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivations, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28 §2201. Creation of remedy

In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of

any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title 28 §2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Title 42 §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX I

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18110

TYLER CREWS, b/n/f BORDEN CREWS, his father,
Plaintiff-Appellant,
v.
EUGENE CLONCS, individually and as Principal of North Central High School, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

August 10, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and CUMMINGS, *Circuit Judges.*

SWYGERT, *Chief Judge.* Defendant Eugene Cloncs, principal, and the other named defendants, all officials of the Metropolitan School District of Washington Township, Marion County, Indiana, refused to readmit plaintiff, Tyler Crews, to North Central High School for the 1969-1970 term on the sole ground that the length of his hair failed to conform to unpublished school rules and regulations. Plaintiff brought this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343, 2201 seeking a preliminary and permanent injuction requiring defendants to permit him to attend regular classes at North Central. After a trial before the court, the district judge denied relief holding that defendants had presented facts sufficient to

satisfy the "substantial burden of justification" required for interference with plaintiff's rights.[1] Shortly thereafter we handed down our decision in *Breen* v. *Kahl*, 419 F. 2d 1034 (7th Cir. 1969). On January 12, 1970 on the motion of plaintiff and in light of our decision in *Breen* we ordered defendants to readmit Crews to North Central pending disposition of this appeal. For the reasons set forth below we reverse the decision of the district court.

Tyler Crew is a seventeen-year-old high school student. In keeping with the prevailing style among many of his generation, he chooses to wear his hair longer than is generally true of his elders. His reasons for this decision were stated in the district court as follows:

> I think it looks better for one reason, and for another reason, I don't associate with a group, but I try to disassociate with general society, you know, people that look normal, because I am not entirely satisfied with things that are happening like this.

Though a similar style prevailed among their own grandfathers, North Central school officials look upon Crews' long hair with great distaste and perceive it as a genuine threat to their own authority and to quality education.

Crews' difficulties with school authorities began in September 1967. At that time, although North Central had published no written rules governing the length of high school student's hair,[2] vice principal Billy Walker demanded that Crews get a haircut. Walker based his

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[1] The decision of the district court is reported at 303 F. Supp. 1370 (S.D.Ind. 1969).

[2] The only school publication concerning matters of dress and appearance was a letter sent to all parents at the beginning of the school year. The letter provided in part:

> The dress and general appearance of North Central students has been through the years a source of pride to the members of the school faculty. Studies have shown a positive correlation between the appearance of a person and his general behavior.
>
> * * *
>
> Parents of North Central students are asked to assist their sons and daughters in maintaining a favorable standard of appearance at school.

The language of the letter indicates that it is intended merely as a suggestion to parents and not as a directive setting forth express standards with which students are expected to comply.

action upon the school requirement that a student's hair must be "above the collar, above the ears and out of the eyes." Crews acquiesced and Walker apparently was satisfied. Acceptance of Crews' hair length, however, was not universal. In accordance with another unpublished rule delegating absolute authority to individual teachers to determine whether a student's appearance is suitable, Crews' gym teacher barred him from physical education classes for the entire 1967-68 school year. Crews also was excluded from his biology class for part of the school year.

At the end of the 1967-68 school year Clones informed Crews that he would not be readmitted to North Central in the fall unless he agreed to periodic haircuts. Rather than comply with this directive, plaintiff enrolled in night classes at the Broad Ripple High School during the 1968-69 school term.

Late in the spring of 1969 Crews again requested admission to North Central. At the regular school board meeting of the Metropolitan School District on June 16, 1969 a hearing was held concerning the Crews case. Plaintiff did not attend, but was represented at the meeting by his father, a lawyer, and a psychiatrist with whom plaintiff had been consulting. An additional meeting of the board was held on June 19 at which time the board adopted the following resolution:

> The history and record of Tyler Crews was presented to the Board of Education by Mr. Clones, Principal of North Central High School and Dean Evans, Assistant Superintendent.
>
> After a thorough discussion of the matter, upon motion duly made, seconded and unanimously carried, the following resolution was adopted:
>
> > 'BE IT RESOLVED, That the request for admission to North Central High School of Tyler Crews be denied, unless the said Tyler Crews conforms to the reasonable rules and regulations as to the length of his hair, for the best interests of the discipline, government and management of North Central High School.'

Plaintiff's action in the district court was commenced shortly thereafter.

Plaintiff raises several important constitutional issues including: (1) whether our recent decision in *Soglin* v. *Kauffman,* 418 F. 2d 163 (1969), permits the imposition of serious sanctions on long-haired students without the promulgation of written rules; (2) whether such rules are subject to the same vagueness and overbreadth standards applied in *Soglin* v. *Kauffman;*[3] (3) whether school board officials can delegate authority to each teacher to refuse class admittance to a student whose hair length the teacher deems unacceptable;[4] and (4) whether the hearing provided on June 16 and 19 satisfies the requirements of procedural due process.[5] We do not consider these issues and instead decide only that the district court erred in holding the evidence presented by defendants satisfied the "substantial burden of justification" required by our decision in *Breen* v. *Kahl, supra.*

I

It is now clearly established that the state does not possess an absolute right arbitrarily to refuse opportuni-

[3] This Circuit has not previously decided whether or to what extent the principles of Soglin v. Kauffman, 418 F. 2d 163 (1969), apply to high schools. Although we do not reach this issue, we note Judge Cummings' observation that "[G]reater flexibility may be permissible in regulations governing high school students than college codes of conduct because of the different characteristics of the educational institutions, the differences in the range of activities subject to discipline, and the age of students, cf. Scoville v. Board of Education,. .... F.2d .... (7th Cir. 1970) (en banc)." Whitfield v. Simpson (Civil No. 69-138, E.D. Ill.), ... F.Supp. .... (1970) (dissenting opinion).

[4] We agree that uncontrolled delegations of power create a substantial risk of arbitrary action which, especially when fundamental rights are involved, may violate due process. Cf. Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951); Louisiana v. United States, 380 U.S. 145 (1965). As a general rule, however, due process requires court intervention only if a plaintiff's interests cannot be effectively protected short of invalidating the delegation of power, Mann v. Powell, (slip opinion p. 13, No. 69 C 2235, N.D. Ill. Dec. 30, 1969), ...F. Supp. ..... We choose not to decide the application of these principles in the present situation.

[5] Plaintiff argues that the holding of Dixon v. Alabama Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961), is inapplicable in the instant case. Again we are of the view that the considerations suggested by Judge Cummings in Whitfield v. Simpson, supra n. 3, may permit considerably wider latitude to high schools in fashioning disciplinary procedures.

ties such as education in public schools or employment in public service. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). "[S]tate-operated schools may not be enclaves of totalitarianism. . . . [Students] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Tinker* v. *Des Moines Independent Community School District, supra* at 511. In order to protect these rights from arbitrary infringement, courts must judge the constitutionality of disciplinary action which denies a student the opportunity to attend classes or to obtain equal opportunity to education. In making this judgment we must weigh and consider competing individual rights and the state's claim to an orderly and efficient educational system. *Richards* v. *Thurston,* 304 F. Supp. 449, 452 (D. Mass.), *aff'd,* 424 F. 2d 1281 (1st Cir. 1970).

In *Breen* we held that plaintiff's right was of a high order of importance. Thus we stated: "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." *Breen* v. *Kahl, supra* at 1036.[6] Our holding rested upon the premise that the Constitution contemplates protection for " 'additional fundamental right[s] . . . which exist alongside those fundamental rights specifically mentioned in the first eight amend-

[6] The same or related position has been taken by many other courts. Richards v. Thurston, 304 F.Supp. 449 (D.Mass.), aff'd, 424 F.2d 1281 (1st Cir. 1970); Miller v. Gillis, ... F.Supp. .... (N.D.Ill. 1969); Farrell v. Smith, ... F.Supp. .... (D.Me. 1970); Sims v. Colfax Community School District, 307 F.Supp. 485 (S.D.Iowa 1970); Westley v. Rossi, 305 F.Supp. 706 (D.Minn. 1969); Griffin v. Tatum, 300 F.Supp. 60 (M.D.Ala. 1969); Zachry v. Brown, 299 F.Supp. 1360 (N.D.Ala. 1967). See generally Note 4, Valpo.L.Rev. 400. Some courts, including the district court in this case, have assumed the existence of a constitutionally protected right but have held that the state has presented sufficient evidentiary justification to infringe plaintiff's right. Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968); Davis v. Firment, 269 F.Supp. 524 (E.D.La. 1967), aff'd, 408 F.2d 1085 (5th Cir. 1969); Brick v. Board of Education, 305 F.Supp. 1316 (D.Colo. 1969). Only the Sixth Circuit, in Jackson v. Dorrier, 424 F.2d 213 (1970), appears to reject completely the proposition that students have a constitutionally protected right to wear their hair at any length or in any manner.

ments.' *Griswold* v. *Connecticut,* 381 U.S. 479, 488 (J. Goldberg concurring)," and that these rights are protected liberties under the due process clause of the fourteenth amendment. There is ample support for the position that this was, indeed, the view of the founding fathers. Thus as the First Circuit has noted, citing *Union Pacific Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891):

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right of one's person may, be said to be a right of complete immunity: to be let alone.' *Richards* v. *Thurston, supra* at 1285.

More recently the Supreme Court has recognized that the special right of an individual to control his physical person weighs heavily against arbitrary state intrusions. *Breithaupt* v. *Abram,* 352 U.S. 432, 439 (1957); *Rochin* v. *California,* 342 U.S. 165, 172 (1952). Indeed, unless the fundamental nature of the liberty claimed by plaintiff is recognized, the freeedom guaranteed by the Bill of Rights could be significantly diluted through subtle forms of state repression and tyranny.[7]

In *Breen* we also recognized that "it would be impossible to comply with the long hair regulation during school hours and follow the wishes of the students and their parents as to hair length outside the school." *Breen* v. *Kahl, supra* at 1037-38. Therefore, since the impact of

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[7] History contains many examples of regimes which have attacked and silenced their opponents by requiring conformity of hairstyle or dress. Thus, following the Manchus' invasion of China in 1644, in order to consolidate its power over Chinese citizens, the founders of the Ching dynasty "transformed the appearance of the country by compelling the male population to shave the front of the head, and to wear the hair in a queue. Official dress was altered from the Chinese style . . . to the skullcap and Tartar gown with high collar and fastening at the side. In the first year or two after the conquest . . . the opposition to these measures was intense, and thousands of people from all walks of life chose to die rather than adapt the marks of servitude." H. McAleavy, History of Modern China, at 23 (1967). Another example includes official prohibition of beards during the reign of Peter the Great. See Richards v. Thurston, supra at 1286.

hair regulations extends beyond the schoolhouse gate, the degree of state infringement on personal rights is significantly greater than in many other areas of school discipline. *See Richards* v. *Thurston, supra* at 1286. As a result we held that "[t]o limit or curtail [plaintiff's right to wear his hair at any length or in any desired manner] . . . the state has a 'substantial burden of justification.' *Griswold* v. *Connecticut,* 381 U.S. at 505 (J. White concurring). *See McLaughlin* v. *Florida,* 379 U.S. 181, 196 (1964)." *Breen* v. *Kahl, supra* at 1036.

In *Breen* the school board offered two justifications to sustain its regulation:

> (1) a William Bay male high school student whose hair is longer than the Board's standard so departs from the norm that his appearance distracts his fellow students from their school work, and (2) students whose appearance conform to community standards perform better in school.

Relying on the factual findings of the district court we held that the record failed to support either of these claims. We noted, however, that "[t]he record contains no suggestion that the length of the hair constituted a health problem or a physical obstruction or danger to any person [nor] was any disruption or disturbance caused by the length of his hair," and expressly reserved the question of "whether a valid showing of any single or combination of justifications, which the School Board did or did not raise, would be sufficient to satisfy the state's substantial burden." *Breen* v. *Kahl, supra* at 1037. It is upon this basis that the defendants argue the case at bar is distinguishable from *Breen.*

II

Although the district court rendered its decision prior to *Breen,* the court, nevertheless, correctly required the defendants to satisfy a "substantial burden of justification" for the exclusion of plaintiff from North Central. The court stated its holding in a conclusionary fashion and did not rely upon particular evidence in the record. However, in accordance with FED.R.CIV.P. 52, we view

the evidence in the light most favorable to the justifications advanced by defendants.

Defendants maintain that they have satisfied their burden under either of two theories. The first is that plaintiff's long hair caused actual disruption in the operation of North Central. The Supreme Court in *Tinker* v. *Des Moines Independent Community School District, supra* at 514, held that a school rule or disciplinary action impinging on fundamental rights is valid only if the record contains evidence "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." We find insufficient evidence in the record to satisfy that test.

Evidence of disruption or interference in school activities presented in the district court consisted of the following testimony: (1) biology teacher Arlen Lickliter testified that some members of the zoology class "checked everyday through the prep room, with windows between, just to see if Tyler happened to be there that day"; (2) Lickliter also testified that Crews' presence caused a "strain" in Lickliter's relations with his students and that plaintiff experienced difficulty in obtaining a microscope partner because of the length of his hair; and (3) Dr. H. D. Evans, assistant superintendent for general administration, stated, without reference to particular facts, that long hair worn by a male student is inherently distracting to other students.

We think that opinion evidence such as that offered by Dr. Evans often reflects only a personal view of the propriety of long hair and, in the absence of factual support, adds little in satisfying defendants' burden. The reference in Lickliter's testimony to specific instances of alleged disruption presents a more difficult problem. These instances permit consideration of an issue expressly reserved in *Breen*, namely, whether and to what extent disruptive conduct of others in response to plaintiff's long hair, can be used to justify plaintiff's expulsion from school.

We agree with the sentiments voiced by Professor Chafee when he observed that it is absurd to punish a

person "because his neighbors have no self-control and cannot refrain from violence," Z. Chafee, FREE SPEECH IN THE UNITED STATES, 151-52 (1941). This principle is generally applicable to prohibit the imposition of state sanctions on a speaker when his speech causes disruption or violence by a hostile crowd, *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *cf. Gregory* v. *Chicago,* 394 U.S. 111 (1969). Because of its relation to the achievement of education goals, the state interest in maintaining order may be greater in the school context than in society in general. Nevertheless, the Supreme Court has indicated that the principles announced in *Termininello* are not without application when the free speech of students is threatened. *Tinker* v. *Des Moines Independent Community School District, supra* at 508. We think a similar principle operates to protect long-haired students unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct. *Ferrell* v. *Dallas Independent School District, supra* at 705 (Tuttle, J. dissenting); *Richards* v. *Thurston,* 304 F. Supp. 449, 454 (D. Mass.), *aff'd,* 424 F. 2d 1281 (1st Cir. 1970). The record is silent, however, concerning actions taken by the school officials to punish those students who actually caused the relatively insubstantial disruption which occurred in this case.[8] Therefore, we hold that defendants have failed to satisfy their substantial burden of justification under their first theory.

Defendants' second theory argues that short hair is required for health and safety reasons. Thus, Keith Farran, chairman of the physical education department, testified that long hair may impair the vision of students engaged in sports such as flag football, tennis, and volleyball, and that long hair could "get caught" when students are using the trampoline. He also noted that students with long hair would be forced to go to class with wet hair after a shower following gym class. Lickliter testified

[8] If school officials have tried and failed to control the disruptive students, emergency action against the long-haired student may be justified only by exceptional circumstances. See generally Brandenburg v. Ohio, 395 U.S. 444 (1969). We need not decide whether temporary suspension or other temporary action rather than expulsion from school would be the appropriate remedy under these circumstances. See Shelton v. Tucker, 364 U.S. 479, 488 (1960).

that long hair creates significant danger when Bunsen burners are in use.

We think this testimony fails to satisfy defendants' burden of justification for two reasons. First, both Farrand and Lickliter admitted that health and safety objectives could be achieved through narrower rules directed specifically at the problems created by long hair. Thus, Farrand testified that long-haired boys could be made to wear shower caps and Lickliter conceded the use of hairnets worn by girls had prevented injury in the biology labs. Since fundamental rights are involved, we believe that defendants are required to employ narrow rules suggested by their testimony and to avoid infringement of plaintiff's rights to an extent greater than is required by health and safety objectives. *Cf. NAACP* v. *Button,* 371 U.S. 415 (1963); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

Second, both witnesses admitted in their testimony that although girls engage in substantially the same activities in gym and biology classes, only boys have been required to cut their hair in order to attend classes. Although classification on the basis of sex has been held constitutional in certain circumstances, *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Miskunas* v. *Union Carbide Corp.,* 399 F. 2d 847 (7th Cir. 1968); *but cf. McCrimmon* v. *Daley,* 418 F. 2d 366 (7th Cir. 1969), defendants have offered no reasons why health and safety objectives are not equally applicable to high school girls. On the present record, therefore, we believe that defendants' action constitutes a denial of equal protection to male students.

In conclusion, we hold that defendants have fallen far short of satisfying their burden of substantial justification required by our decision in *Breen.* We have examined the evidence in this case with a great deal of care. Despite the rationalizations offered by defendants, we believe that their action in excluding plaintiff from North Central resulted primarily from a distaste for persons like plaintiff who do not conform to society's norms as perceived by defendants.

The judgment of the district court is reversed and the cause is remanded for entry of an injunction consistent with the holding of this case.
A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX J

SUPREME COURT OF THE UNITED STATES

October Term, 1970

Cresley Karr, a minor, individually, and John R. Karr, Individually and as next friend and Guardian ad litem on behalf of themselves and all others similarly situated,

v.

Clifford Schmidt, Principal of Coronado High School, et al.

On Motion to Vacate a Stay of Injunction Pending Appeal.

[February 11, 1971]

MR. JUSTICE BLACK, Circuit Justice.

This "Emergency Motion to Vacate a Stay of Injunction Pending Appeal" has been presented to me as the Supreme Court Justice assigned to the Court of Appeals for the Fifth Circuit. The motion concerns rules adopted by the school authorities of El Paso, Texas, providing

that school boys' hair must not "hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision." The rules also provide that boys will not be admitted to or allowed to remain in school unless their hair meets this standard. The United States District Court for the Western District of Texas, El Paso Division, held after hearings that this local student hair length rule violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and enjoined its enforcement, declining to suspend its injunction pending appeal. On motion of the school authorities, the Court of Appeals for the Fifth Circuit stayed and suspended the District Court's injunction and the student appellees have asked me to vacate the Court of Appeals' stay of the injunction. Should I vacate the stay the El Paso school authorities would remain subject to the District Court's injunction and would thereby be forbidden to enforce their local rule requiring public school students not to wear hair hanging over their collars or obstructing their visions.

I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school system in accordance

with their own best judgment as to the appropriate length of hair for students.

The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

Application denied.

APPENDIX K

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

June 25, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

JACK LIVINGSTON, a minor, etc., and TIM HELLBERG, a minor, etc., *Plaintiff-Appellants,*
vs.
HARLEY SWANQUIST, *et al.*, *Defendants-Appellants.*

No. 18663

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

On consideration of the motion of counsel for defendants-appellees,

It Is Ordered that the issuance of the mandate of this Court be stayed for a period of thirty (30) days in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

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Supreme Court, U.S.
FILED
AUG 19 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-109

JACK LIVINGSTON, a minor, by TENNYSON D. LIVINGSTON, his father and next friend; and TIM HELLBERG, a minor, by HARRY HELLBERG, his father and next friend,

Respondents,

vs.

HARLEY SWANQUIST, MILES LUTTER, LYLE HUGHARD, JAY GOSSETT, JACK BROBST, GERALD DAUWALDER, RAYMOND LUBBS, each individually and as members of the Board of Education for School District 308; DOUGLAS MOEWS, individually and as Principal of the Oswego Community High School; and the BOARD OF EDUCATION for the School District 308,

Petitioners.

PETITION FOR LEAVE TO FILE AMENDMENT TO APPENDIX

AMENDMENT TO APPENDIX

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Respondents,

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Petitioners.

PETITION FOR LEAVE TO FILE AMENDMENT TO APPENDIX

THE Petitioners by Lambert M. Ochsenschlager, and Robert B. Hupp, hereby Petition for Leave to File Instanter an amendment to the Appendix, and as grounds for said motion show:

(1) That a Petition for Writ of Certiorari has heretofore been filed, which Petition contains and Appendix as prescribed by the rules.

(2) That after the filing of the aforesaid Petition the decision of the Court of Appeals for the Ninth Circuit in the cases of King v. Saddleback Junior College and Olff v. Eastside Union High School District were printed and disseminated, a copy of which is attached hereto and incorporated herein.

(3) That the only purpose of this motion is to make available this Opinion which has not yet been printed in the customary law reports.

(4) That the time for the filing of a Petition for Certiorari has not yet expired.

Respectfully submitted,

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P. O. Box 1264
Aurora, Illinois 60507

Attorneys for Petitioners

L. M. Ochsenschlager
Robert B. Hupp
Of Counsel

AMENDMENT TO APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LINDAHL KING; and MARK CARLSON, MICHAEL MARTIN, JOHN KINDEL and JOHN URRAY, minors appearing by their Guardians Ad Litem,

Plaintiffs-Appellees,

v.

SADDLEBACK JUNIOR COLLEGE DISTRICT, a public corporation; FRED H. BREMER, Superintendent,

Defendants-Appellants.

No. 26,452

Appeal from the United States District Court for the Central District of California

ROBERT OLFF, a minor, by and through his guardian Ad Litem, Mrs. Sonny Olff,

Plaintiff-Appellee,

v.

EAST SIDE UNION HIGH SCHOOL DISTRICT,

Defendant-Appellant.

No. 25,132

[June 25, 1971]

Appeal from the United States District Court for the Northern District of California

Before: HAMLEY, CARTER and TRASK, Circuit Judges

TRASK, Circuit Judge:

Each of these cases is an appeal from an order of the district court enjoining the enforcement of a provision of a school dress code providing for limitations on the length of hair of male stu-

dents. The cases were argued and submitted at the same time. They involve issues which are substantially the same. They will be considered together.

No. 25,132 was a petition for injunctive and declaratory relief filed by Robert Olff, a minor, by his guardian ad litem, Mrs. Sonny Olff, against the East Side Union High School District in the United States District Court for the Northern District of California.

No. 26,452 was a complaint for an injunction and for declaratory relief filed by Lindahl King and others against the Saddleback Junior College District and Fred H. Bremer, its Superintendent and the President of the College, in the United States District Court for the Central District of California.

Jurisdiction in each case was invoked below under the Fourteenth Amendment, the Civil Rights Act (42 U.S.C. § 1983), and 28 U.S.C. § 1343 and here under 28 U.S.C. § 1292(a)(1).

Article IX of the California Constitution provides for the establishment of a public school system with County Boards of Education and County Superintendents. Section 5 of that article delegates to the Legislature the duty of implementing this provision.

> "The California Legislature is vested with the power to carry out the mandate of the operation of a free public school system in California. (Calif. Const., art. IX, § 1.) The Legislature has conferred upon school boards statutory authority to promulgate rules and regulations governing the conduct and operation of public schools. 'Every school district shall be under the control of . . . a board of education.' (Ed. Code, § 921.) 'The governing board of each school district shall prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government.' (Ed. Code, § 925.) All pupils must comply with school regulations. (Ed. Code, § 10609; Calif. Adm. Code, Title 5, Education, art. 7, p. 50 § 62.) A Board of Education of a school district has power to adopt a Code of Pupil Discipline and, as a part thereof, a 'Good Grooming Policy' to insure personal cleanliness and neatness of dress (see Calif. Adm. Code, Title 5, art. 7, §§ 62, 64), providing the rule does not unreasonably infringe upon the exercise of a constitutional right. (*Bagley v. Washington Township Hospital Dist., supra,*

65 Cal.2d 499, 501-502.)" *Akin v. Board of Education of Riverside Unified School Dist.*, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *cert. denied*, 393 U.S. 1041.

It was pursuant to this authority that the East Side Union High School District adopted its "Policies Pertaining to Student Behavior."[1] The stated objectives were:

"1. To facilitate the teaching and learning situation in the class room.

2. To establish and maintain decorum in the schools and community.

3. To aid our youth in the development of responsible attitudes and habits.

4. To aid in the fulfillment of the responsibility invested in the school by the State of California and the community of the East Side Union High School District." C.T. 7.

The articles covered sixteen subjects including "General Conduct," "Attendance," "Personal Appearance, Cleanliness and Neatness of Dress," "Tobacco," "Alcohol," "Drugs," "Obscenities," "Fighting," and "Hazing." Under the subject of "Personal Appearance" standards are set out for both boys and girls with seven items to be observed by boys and five items to be observed by girls. The item in question here provides:

"c. Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not cover the ears, and it shall not extend below the collar in back." C.T. 7.

The "Personal Appearance" section further provides that "a district committee of students, teachers, administrators and parents shall each year review changing styles as they affect appropriateness of dress for the consideration of the Superintendent."

The Director of Personnel of the district executed an affidavit (C.T. 48-49) stating how this annual review was carried out. She stated that she served as Chairman of a Behavior Code Review Committee which met on four occasions during May and June of 1969. The committee was composed of:

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[1]The "Policies" were adopted on September 24, 1959, and had been revised 8/64, 10/65, 3/67, 7/68, and 8/69. C.T. 7-10.

"1. The PTA president from each school;

2. A parent from the 'integrated parents group' from each school (parents from each school representing various ethnic groups);

3. The ASB [Associated Student Body] president elect from each school;

4. Another elected ASB officer of the opposite sex from the president;

5. A teacher from each school;

6. In addition to above a woman counselor from Overfelt and four administrators from various schools in the district were appointed." C.T. 48.

With respect for the result of the annual review, the affidavit states that the following action was taken:

"At the meeting of June 23, 1969, there were 22 members of the committee present of whom seven were students. Referring to article IV, Item C under Boys, the following was voted on and passed by a vote of 20 ayes and 2 noes:

'Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not extend below the collar in back.'"

This affidavit was not controverted.

It was against this backdrop of regulation that Robert Olff, age 15 years, attempted to register as a third year high school student at James Lick High School in San Jose, one of the schools of the East Side Union High School District. The teacher who interviewed him was of the opinion that his hair was in violation of the grooming code and asked him to see one of the vice principals. He did so and was refused enrollment until his hair was made to conform.[2]

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[2]At this point we note some confusion about the factual issue as to whether or not the appellee's hair was in violation of the rule. The court made an express finding that it did not violate the grooming code. *Olff v. East Side Union High School District*, 305 F.Supp. 557, 557 (N.D.Cal. 1969). Plaintiff's own counsel at the evidentiary hearing stated that the plaintiff did not consider that this issue was a factual one. R.T. 12. Plaintiff urges the invalidity of the regulation. He does not contend that his hair is not in violation of a valid regulation. We treat the problem as it was presented.

Upon the rejection of Olff by the school he filed a complaint seeking injunctive relief, a declaratory judgment and damages. The court directed the school to show cause why a preliminary injunction should not issue enjoining the defendants from excluding the plaintiff. On the return date of that order the plaintiff, Olff, testified briefly, the defendant school district introduced a number of affidavits, and the matter was submitted. The court enjoined the defendant from enforcing the regulation in question and enjoined the defendant from excluding the plaintiff from attending the school. *Olff v. East Side Union High School District*, 305 F.Supp. 557 (N.D.Cal. 1969). We reverse for reasons hereinafter set forth.

The second case, No. 26,452, has been here before. An order for a preliminary injunction was vacated and the cause remanded for further proceedings. *King v. Saddleback Junior College District*, 425 F.2d 426 (9th Cir. 1970). The record does not indicate that any witnesses testified upon trial after remand. Certain exhibits were ordered filed, additional authorities were submitted with memoranda of law and arguments of counsel, and an order and memorandum opinion thereupon issued. The court held that the regulation in question was in violation of both the due process and equal protection clauses of the Fourteenth Amendment. The school district and superintendent appeal. We reverse.

In this case the Board of Trustees also adopted a "Student Handbook" which contained, among other things a dress code for men and for women. At least three meetings of the Board were held at which the provisions of the code were considered. (Plaintiff's Exh. 2 and 3). It had been prepared by the administration of the school and submitted to the student body whose representative attended the last two meetings and voiced the opinion of the student body. There was some revision and apparent agreement on all items except the regulation concerning hair for men. The students wished it to read "clean and combed."[3] The administration,

[3]"Mr. Kenyon [student representative]: We discussed this in the Dress Code Committe [sic], the idea of the length of hair, and the main thing is we didn't want to get out and start measuring the hair, and that would be the only real way you could set down a specific length of hair. So we tried to think of some words which we felt would not necessarily stipulate the length of hair, but more or less keep it within the idea of good taste, perhaps, and at the same time, we wanted to keep away from the really, really gigantic radical-type hair, so we came up with the words clean

having in mind the rejection of similar school grooming codes because "unconstitutionally vague," desired to eliminate such a problem. (Plaintiff's Exh. 2 at 2). The result was language almost identical with that of the *Olff* case.[4] In neither case was there any evidence that length of hair led to any disruption among students.

The constitutional, statutory and regulatory authority for a junior college is the same as that for a high school, since both institutions are a part of the public secondary school system of the state. Cal. Educ. Code §§ 5552, 22650 (West 1969).[5]

The authorities in the welter of cases involving men's hair dress versus school regulations are about equally divided in their results, some of which hold the regulation invalid; *e.g., Crews v. Cloncs,* 432 F.2d 1259 (7th Cir. 1970); *Griffin v. Tatum,* 425 F.2d 201 (5th Cir. 1970) (partially invalid); *Richards v. Thurston,* 424 F.2d 1281 (1st Cir. 1970); *Breen v. Kahl,* 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); *Crossen v. Fatsi,* 309 F.Supp. 114 (D. Conn. 1970), (unconstitutionally vague); and others which uphold the regulation issued by the school authorities; *e.g., Stevenson v. Board of Educ.,* 426 F.2d 1154 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970); *Jackson v. Dorrier,* 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970); *Davis v. Firment,* 408 F.2d 1085 (5th Cir. 1969), *aff'g per curiam,* 269 F.Supp. 524 (E.D.La. 1967); *Ferrell v. Dallas Indep. School Dist.,* 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).[6]

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and combed. We felt, within the Committee, the Committee felt that a person who has under the interpretation of the Administration, who has clean hair and the hair is also well combed—we thought about putting the words groomed or combed and decided on combed for the present. We felt this would more or less be stipulated so we would not have any gigantic, enormous change." Plaintiff's Exh. 3 at 10.

[4]"Hair which falls below the eyebrows, or covers all or part of the ear, or hangs entirely over the collar of a dress shirt." C.T. 7.

[5]Under an amendment adopted in 1970 the word "community" was substituted for the word "junior" in referring to such colleges as part of the public secondary school system. Stats. 1970, c. 102, pp. 152, 240, §§ 95,322.

[6]A recent case note in 84 Harv. L. Rev. 1702 (1971) collects many of the cases and finds a slight edge favoring the school authorities. As might be expected, some of them are decided on deficiencies in proof by one side or another. *Id.* 1703-04.

In the two cases before us, reliance by the plaintiffs for a constitutional violation is at the outset placed upon the First Amendment, based primarily on the authority of *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969).[7]

In *Tinker* a group of people, some whom had children in school, held a meeting and determined to publicize their objections to the Vietnam war by wearing black armbands during the holiday season. The school authorities, aware of the plan, adopted a policy that any student wearing an armband and refusing to remove it would be suspended. The Court determined this conduct to be a primary First Amendment right akin to "'pure speech.'" 393 U.S. at 505, 508.

In the cases before us, neither of the regulations on its face indicates a conflict with freedom of speech. There was no evidence that either regulation was enacted by the respective school authorities with such a purpose in mind. Moreover, the students were not purporting to say anything. Plaintiff Olff flatly stated that his hair style was not a badge or a symbol of any group. On the contrary, he said that he was "a minority of one." R.T. 27.

Certainly within the pleadings and evidence in these cases there was no intention to assert First Amendment rights, whether characterized as "pure speech" or "symbolic speech," nor was any such contention made in the courts below. The activity involved is akin to conduct and the attachment of the label "symbolic speech" does not make it symbolic speech in the absence of circumstances showing it to have been so intended.[8] Therefore, we do not believe that *Tinker, supra,* controls either of these cases since *Tinker* appears to clearly distinguish between rights akin to "pure speech"

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[7]Although plaintiffs in *King* now assert First Amendment protection, the district court in its first opinion said:

> "3. Plaintiffs have made no contention that enforcement of the Dress Code has violated their freedoms of speech or religion." C.T. at 109.

[8]Moreover, even when "symbolic speech" is asserted to have been intended, the Supreme Court has not always been receptive to the argument:

> "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

and those school regulations having to do with personal appearance, style of clothing, or deportment.[9]

There is another distinction between these cases and *Tinker*. In *Tinker* the school authorities did not permit an armband to be worn only "so long as it did not exceed" a certain width. The proscription was absolute. In *King* and *Olff*, on the contrary, a male student could express his personality by means of his hair at any length between a short hair cut and a long one, limited only so that the hair did not fall below the eyes in front, nor cover the ears, nor extend below the collar in back.[10]

Apart from the First Amendment claims, many of the cases cited rely upon a "right to be let alone," analogizing that right to the right of privacy or to the fundamental liberty of the individual implicit in the Fifth Amendment. Among the cases thus submitted is *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the right of the state to invade marital privacy was proscribed as an undue intrusion. Neither *Griswold* or cases akin to *Griswold* are appropriate here. The conduct to be regulated here is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others.[11] This is not to say that persons within the school system as students do not retain their constitutional rights. For, as has often been repeated,

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[9]"The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. *Cf. Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968); *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923)." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969).

[10]Dr. Bremer, the Superintendent of Saddleback, in his affidavit stated that a student could also be in compliance without cutting his hair.

"The Saddleback College Dress Code regulation of male hair styles does not require that hair be cut to any particular length and compliance achieved by means of styling of the hair by means of a headband, for example, is acceptable." Plaintiff's Exh. 11.

[11]Even Judge Cooley's oft quoted statement (*see Richards v. Thurston*, 424 F.2d 1281, 1285) that "The right to one's person may be said to be a right of complete immunity: to be let alone," does not hold true in all circumstances. *See, e.g., Schmerber v. California*, 384 U.S. 757, 759 (1966); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957); *Raderman v. Kaine*, 411 F.2d 1102 (2nd Cir.), *cert, dismissed*, 396 U.S. 970 (1969).

> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Tinker v. Des Moines School Dist., supra,* at 511.

Litigants and courts alike, notwithstanding the frequent assertion of theories based on the First Amendment and the right to privacy, have had difficulty in reaching a consensus on which constitutional provision, if any, affords the protection sought here. Some litigants have tried the "shot gun" approach, asserting claims under several amendments, *Jackson v. Dorrier,* 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970),[12] while some courts have found relief in the equal protection clause of the Fourteenth Amendment, *Dunham v. Pulsifer,* 312 F.Supp. 411 (D. Vt. 1970), or *somewhere* within the First or Ninth Amendments, albeit unspecified. *Breen v. Kahl,* 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).[13] No doubt their confusion is fostered by the tenuous nature of the right asserted.

The district court in *Olff,* quoting from Judge Wyzanski's opinion in *Richards v. Thurston,* 304 F.Supp. 449, 452 (D. Mass), *aff'd,* 424 F.2d 1281 (1st Cir. 1969), held that plaintiff's claim to "'liberty to express in his own way his preferences as to whatever hair style comports with his own personality and his search for his own identity'" was protected under the "broad terms" of the due process clause of the Fourteenth Amendment from what the court found was a lack of a "rational" ground for regulation.[14] *Olff v. East Side*

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[12]In *Jackson v. Dorrier* claims were asserted of violation of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. 424 F.2d at 218.

[13]"Whether this right is designated as within the 'penumbras' of the first amendment freedom of speech, . . . or as encompassed within the ninth amendment . . . it clearly exists. . . ." *Breen v. Kahl,* 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

[14]It should be noted that in *Richards v. Thurston,* 304 F.Supp. 449 (D. Mass.), *aff'd,* 424 F.2d 1281 (1st Cir. 1969), there was no evidence of a formal written regulation of the school authorities setting maximum hair length, nor evidence of any justification arising out of health, performance, or disciplinary concerns. In fact, the court found no reason for the school

Union High School District, supra, at 559. And the court in *King* found both due process and equal protection violations.

EQUAL PROTECTION

There was no evidence of racial discrimination or that the regulation in either case was applied in other than in an even-handed manner, nor was there any evidence of unequal protection other than the assertion that boys were treated differently than girls; *i.e.*, girls could have long hair and boys could not. We do not consider the latter difference in treatment or classification as creating any substantial constitutional question.

DUE PROCESS

In examining the due process aspect of the argument, in order to discover whether a rational basis for regulation exists, we find, as previously described, clear expressions of authoritative bodies giving to the school boards in California the right to establish regulations for the day to day operation of its school. Cal. Educ. Code § 925 (West 1969). There is also a statute and a similar administrative regulation which impose a *duty* upon the student to comply with the board's regulations. Cal. Educ. Code § 10609 (West 1969); 5 Cal. Adm. Code § 300.[15] Those regulations must be lawful, of course, but given this state interest and authority to regulate within constitutional bounds we would assume that some regulations necessary for the day to day operation of schools, classes, and the general educational processes, are permissible. We would also assume that in the absence of a clear violation of a constitutional right, the burden is upon those who assail the regulation to prove their invalidity. This they have not done here.

On the other hand, the school district in *Olff* presented affidavits of eleven teachers and administrators in the high school district

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principal's suspension of the plaintiff "except possibly the principal's personal prejudice, the community conventions of the first half of the twentieth century, and the views of some contemporaries, who may or may not be a majority of Marlboro's population, or of its parents, or of its students." 304 F.Supp. at 451.

[15] "All pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of the schools." Cal. Educ. Code § 10609 (West 1969).

whose disclosed experience ranges from two and one-half years to seventeen years. Each of these officials voices an opinion based upon his or her professional experience that extreme hair lengths of male students interferes with the educational process. Each of the opinions might be debated to some extent as was done by the trial court. The fact remains, however, that the affidavits are from trained professionals who are in day to day observation of their classrooms. While lawyers and judges may disagree, none of the affidavits is so inherently improbable that it is lacking in value as evidence.[16]

In *King*, affidavits were submitted of a similar nature. Dr. Fred H. Bremer, Superintendent of the District and President of Saddleback College, who has had considerable academic training (B.S., M.Ed., Ed.D.) and wide experience in education, filed an affidavit stating among other things:

> "Based upon my academic training and administrative experience, I am of the opinion that dress codes which include regulations applicable to male hair styles are desirable for junior colleges. Such codes aid in maintaining an environment which is conducive to learning and in avoiding disruptions of the educative process."

The plaintiffs in *King* submitted affidavits of two administrators, one of a different high school district and one of a different college district, not directly in contradiction of Dr. Bremer, stating the situation at their particular schools. The eleven affidavits in *Olff* were uncontradicted.

Much emphasis was placed upon the fact that no disruption had occurred in either school even though some of the male students wore long hair. Disruption, of course, if related, would be significant. Its absence, however, does not establish that long-haired males cannot be a distracting influence which would interfere with

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[16]One of the affiants, the District Director of Driver & Safety Education, also had eleven years of teaching Industrial Arts Woodworking and Automotive classes. After giving examples of safety hazards of men with long hair he concludes: "In conclusion, long hair can be an extreme safety hazard in many situations unless hair nets, clips, ribbons etc. are worn. [He previously averred that boys would not wear them]. Long hair on male students also tends to create a less serious atmosphere, more weisted [sic] time, more discipline problems, more class distractions and *LESS EDUCATION.*" C.T. 59. (Emphasis in original).

the educative process the same as any extreme in appearance, dress, or deportment. The affidavits in *Olff* clearly show this, and the affidavit of Dr. Bremer in *King* and comments at the hearing on the dress code likewise are to this effect.[17]

This is not a question of preference for or against certain male hair styles or the length to which persons desire to wear their hair. This court could care less. It is a question of the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate, and to do it without unconstitutionally infringing upon the rights of those who must live under it. We do not believe that the plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed. We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The judgment granting a permanent injunction in No. 26,452, *King v. Saddleback Junior College District, et al.*, is reversed. The order granting a preliminary injunction in No. 25,132, *Olff v. East Side Union High School District*, is set aside and the case remanded for further proceedings in accordance with this opinion.

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[17]Since the cases come to us largely upon the same written record that was before the trial courts, there is no problem of weighing credibility.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-109

JACK LIVINGSTON, ET AL.,
Respondents,

vs.

HARLEY SWANQUIST, ET AL.,
Petitioners.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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This responding brief is written at the request of this Court. In response, while we take quite serious exception to many of the characterizations and distortions made by Petitioners in regard to the facts of this case,[1] a detailed statement at this stage is unnecessary for the essential facts are simple. Suffice it to say that the Defendant School

1. For example, contrary to Petitioners' assertions, we believe the code to be both unreasonable and exceedingly arbitrary. Similarly, we not only strenuously object to Petitioners' characterization of these boys as displaying "a strong desire to abolish all restraint and all discipline," but find it somewhat anomalous for a School Board which was told by its own attorney that the code was unconstitutional, but nevertheless decided to enforce the code and deprive these boys of their education, to accuse anyone of, in effect, being lawless. Finally, Petitioners' attempt to contrast "the long haired students and the normal students" relies on Petitioners' own distorted sense of normalcy not ours.

Board enacted a dress code in November 1969 which, *inter alia,* limited the length of hair to be worn by male students. This code was enacted and enforced even though there was no evidence prior to its enactment of long hair causing any disruption in any classroom or posing any danger to health or safety. After the code's enactment, a group of students whose hair fell below the School Board's standards were ordered to leave school and not return until their hair was considered appropriate, *i.e.,* not below the top of their collars, nor covering any part of their ears. Jack Livingston and Tim Hellberg refused to have their hair cut, and despite numerous efforts on their part to be re-admitted to school and the advice of the school board's own attorney that the code was unconstitutional, they were not re-admitted until they brought suit in federal district court.

That court was later to rule that they had no constitutional right to wear their hair at any length. This decision was reversed on appeal by the Seventh Circuit on the basis that students have such a constitutional right and that the evidence in this case, consisting entirely of the testimony of so-called "experts" on the effect of long hair on the learning environment, was insufficient to deprive these two students of their fundamental liberties. There was, as previously mentioned, a complete absence of any disruptive behavior either by these two students or in any way related to the length of their hair.

While Petitioners present for review numerous issues, in reality, the two basic issues are:

1. Whether students have a constitutional right to wear their hair at any length; and,

2. Whether the evidence in this case, based entirely on the testimony of so-called "experts," is sufficient to deprive students of their constitutional rights.

As Petitioners have pointed out, there exists a serious conflict among the Circuits on the first issue. Thus, in *Richards* v. *Thurston,* 424 F. 2d 1281 (1st Cir. 1970), and in several Seventh Circuit decisions, *Breen* v. *Kahl,* 419 F. 2d 1034 (7th Cir. 1969), *cert. denied,* 90 S. Ct. 1836 (1970); *Crews* v. *Cloncs,* 432 F. 2d 1259 (7th Cir. 1970), the First and Seventh Circuits have found such a constitutional right to exist. Decisions in the Fifth, Sixth and Ninth Circuits have taken a contrary position. *See, e.g., Wood* v. *Alamo Heights Independent School District,* 433 F. 2d 355 (5th Cir. 1970); *Jackson* v. *Dorrier,* 424 F. 2d 313 (6th Cir. 1970); *Olff* v. *Eastside Union High School District,* ..... F. 2d ..... (9th Cir. 1971).

Similarly, there exists a conflict between the Seventh and Ninth Circuits on the adequacy of such expert testimony, as presented here, to vitiate this constitutional right. *Compare, Livingston* v. *Swanquist* ..... F. 2d ..... (7th Cir. 1971) and *Crews* v. *Cloncs,* 432 F. 2d 1259 (7th Cir. 1970) *with King* v. *Saddleback Junior College District,* ..... F. 2d ..... (9th Cir. 1971) and *Olff* v. *Eastside Union High School District,* ..... F. 2d ..... (9th Cir. 1971).

Moreover, litigation such as this has inundated, as Petitioners have noted, courts in every Circuit and a decision by this Court would, one way or the other, end this flood of litigation which is costly not only to school boards but to private litigants as well.

Finally, that these issues present important questions to be decided by this Court is not only underscored by this significant amount of litigation, but by the constitutional rights that these two students have asserted. Certainly, in a long line of cases, this Court has time and again protected the constitutional rights of students from the arbitrary inroads of school boards. *See, e.g., Tinker* v. *Des Moines Independent Community School District,* 393

U. S. 503 (1969); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). While the narrow interests of Jack Livingston and Tim Hellberg might direct that the petition for certiorari be opposed, they believe, and we concur, that larger interests are involved here, interests not only of judicial economy, but of protecting students, such as themselves, from the capricious and unreasonable abuses of school boards. As this Court noted in *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960): "The vigilant protection of constitutional rights is nowhere more vital than in the community of American schools." Thus, we submit that this case is an appropriate one for the granting of certiorari and, therefore, do not oppose Petitioners' request.

Respectfully submitted,

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